Supreme Court, U.S.
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No. 95-1132

In The

Supreme Court of the United States

October Term, 1995

SANDRA R. HALL,

Petitioner,

v.

SAVINGS OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals correctly determined that Savings of America complied with the purposes of Federal Rule of Civil Procedure 50(b), where Savings' counsel alerted both the district court and opposing counsel to allegations of insufficient evidence, and where the district court acknowledged Savings' motion as "timely"?

2. Whether, under Texas law, the Fifth Circuit appropriately relied in part on federal standards for guidance in defining "disability"?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

REVIEW IS UNWARRANTED BECAUSE THE DECISION OF THE CIRCUIT COURT WAS CORRECT. IT DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR ANY COURT OF APPEALS 3

A. Circuit Courts, Including the Fifth Circuit, Uniformly Hold That Litigants Must Adhere to Rule 50(b) 3

B. The Fifth Circuit Correctly Determined that Savings' Counsel Complied With Rule 50(b).. 7

C. The Fifth Circuit's Interpretation of the TCHRA is Proper Under Texas Law 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Abeshouse v. Ultragraphics, Inc., 754 F.2d 467 (2d Cir. 1985) 4

American Protein Corp. v. AB Volvo, 844 F.2d 56 (2d Cir. 1988), *cert. denied*, 488 U.S. 852 (1988) 7

Armstrong v. Federal Nat'l Mortgage Ass'n, 796 F.2d 366 (10th Cir. 1986)..... 6

Bohrer v. Hanes Corp., 715 F.2d 213 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984) 5, 7, 8

Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp, 41 F.3d 182 (4th Cir. 1994) 4

Bunch v. Walter, 673 F.2d 127 (5th Cir. 1982)..... 4

Caballero v. Central Power & Light Co., 858 S.W.2d 359 (Tex. 1993) 9

Cabrales v. County of Los Angeles, 864 F.2d 1454 (9th Cir. 1988) 4

Central Power & Light Co. v. Caballero, 804 S.W.2d 534 (Tex. App. – San Antonio 1990), *rev'd*, 858 S.W.2d 359 (Tex. 1993)..... 10

Chevron Corp. v. Redmon, 745 S.W.2d 314 (Tex. 1987)..... 9

Coughlin v. Capitol Cement Co., 571 F.2d 290 (5th Cir. 1978) 4

Daley v. Koch, 892 F.2d 212 (2d Cir. 1989) 9

Dancey Co. v. Borg-Warner Corp., 799 F.2d 717 (11th Cir. 1986) 4

Della Grotta v. State of R.I., 781 F.2d 343 (1st Cir. 1986)..... 4

TABLE OF AUTHORITIES – Continued

Page

Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988) 9

Finney v. Baylor Medical Ctr. Grapevine, 792 S.W.2d 859 (Tex. App. – Fort Worth 1990, no writ) 10

Firestone Tire & Rubber Co. v. Pearson, 769 F.2d 1471 (10th Cir. 1985) 4

Freimanis v. Sea-Land Serv., Inc., 654 F.2d 1155 (5th Cir. 1981) 4

Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988) 6

Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983) 6

Hughes v. Halifax County Sch. Bd., 855 F.2d 183 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989) 6

Johnson v. University of Wis.-Milwaukee, 783 F.2d 59 (7th Cir. 1986) 4

Jones v. Lewis, 957 F.2d 260 (6th Cir. 1992), *cert. denied*, 506 U.S. 841 (1992) 4

Lucas v. United States, 807 F.2d 414 (5th Cir. 1986) 10

Matthias v. Bingley, 906 F.2d 1047 (5th Cir. 1990) 8

McCann v. Texas City Ref., Inc., 984 F.2d 667 (5th Cir. 1993) 4, 5, 7

McGee v. Bauer, 956 F.2d 730 (7th Cir. 1992) 5

McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984) 6, 7

Myers v. Norfolk Livestock Mkt., Inc., 696 F.2d 555 (8th Cir. 1982) 4

TABLE OF AUTHORITIES – Continued

Page

Piesco v. Koch, 12 F.3d 332 (2d Cir. 1993) 5

Reeves v. Teuscher, 881 F.2d 1495 (9th Cir. 1989) 6

Repola v. Morbark Indus., Inc., 934 F.2d 483 (3d Cir. 1991) 6

Steverson v. Goldstein, 24 F.3d 666 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 731 (1995) 4

Wang Labs., Inc. v. Toshiba Corp., 993 F.2d 858 (Fed. Cir. 1993) 4

Wells v. State Farm Fire & Casualty Co., 993 F.2d 510 (5th Cir. 1993) 4

Whelan v. Abell, 48 F.3d 1247 (D.C. Cir. 1995) 4

STATUTES AND RULES

Federal Rule of Civil Procedure 50(b) ..... *passim*

Fifth Cir. Local R. 47.5 8

Texas Commission on Human Rights Act (TCHRA), Tex. Lab. Code Ann. §§ 21.001 *et seq.* (Supp. 1996) 1, 2, 3, 9, 10

Tex. R. App. P. 114 10

STATEMENT OF THE CASE

The Fifth Circuit found that Sandra R. Hall's ("Hall") state law claims against Savings of America ("Savings") were not supported by sufficient evidence. *Hall v. Savings of America*, No. 94-60091 (5th Cir. Sept. 14, 1995), Pet. Br. App. A. In an unpublished opinion, the Circuit Court held that Hall had failed to show a causal connection between her termination and the filing of a worker's compensation claim. Pet. Br. App. A at 19. The Circuit Court also found that neither condition of which Hall complained – carpal tunnel syndrome and emotional difficulty – constituted a "disability" as defined by the Texas Commission on Human Rights Act (TCHRA), Tex. Lab. Code. Ann. §§ 21.001 *et seq.* (Supp. 1996). Pet. Br. App. A at 22, 24. The Circuit Court therefore reversed the judgment of the trial court. In her petition, Hall complains of the standard of review employed by the Circuit Court in reviewing her workers' compensation retaliation claim; her complaint rests on her argument that Savings failed to comply with Fed. R. Civ. P. 50(b). In addition, Hall argues that the Circuit Court misunderstood the definition of "disability" under the TCHRA.

At the close of Hall's case-in-chief, Savings moved for judgment as a matter of law on the retaliation claim. The trial judge twice assured Savings that its motion was "timely":

> Let me emphasize, to the extent that you have missed something, you have the right to supplement your motion at the completion of the case and its (sic) timely in all elements under Rule 50(a)(2). So I'm not going to preclude you. You may supplement on anything appropriate.

(Tr. VI; 471) The trial judge then assured Savings:

> But I acknowledge [Savings' motion at the close of Hall's case] submission on a timely basis *for all purposes*, and it constitutes the record for appellate scrutiny.

(Tr. VI; 472) (emphasis added).

After Savings presented its case, which consisted of just one witness comprising five pages in the record, it relied on the trial judge's assurance that its previous motion constituted "the record for appellate scrutiny." It did not "supplement" its previous motion on the retaliation claim. Savings did supplement its motion on the TCHRA claim and therefore, at the close of all the evidence, emphasized the absence of any evidence of a disability.

The Fifth Circuit determined that, by alerting both the district court and opposing counsel to the allegations of evidentiary insufficiency, Savings' counsel satisfied the purposes of Rule 50(b). Pet. Br. App. A at 13. The Fifth Circuit also determined that any procedural abnormality under Rule 50(b) was occasioned by the district court. Pet. Br. App. A at 13. Finally, the Fifth Circuit determined that neither Hall's emotional problems nor her carpal tunnel syndrome constituted a "disability" as defined in the TCHRA. Pet. Br. App. A at 22. The Fifth Circuit relied in part on case law developed under the Federal Rehabilitation Act. The Fifth Circuit accordingly entered judgment in favor of Savings on both of Hall's claims.

REASONS FOR DENYING THE WRIT

The Circuit Court properly determined that Savings complied with the purposes of Rule 50(b) and held the district court responsible for Savings' technical miscue. All of the circuit courts, *including* the Fifth Circuit, agree that litigants must comply with the purposes of Rule 50(b). The Fifth Circuit read Rule 50(b) to avoid placing technique before substance, but that reading does not place the Fifth Circuit at odds with any other circuit. Rather, the departure from Rule 50(b)'s technical demands represented a discretionary determination that, on the unique facts of this case, Rule 50(b)'s purposes had been served.

In addition, the Fifth Circuit correctly determined that Hall failed to adduce evidence of a "disability" as defined under the TCHRA. This determination is supported by abundant federal law. Hall offers no authority for her complaint that the definition of "disability" used by the Fifth Circuit was unduly restrictive. In any event, the appropriate forum to address that complaint was the Texas Supreme Court.

REVIEW IS UNWARRANTED BECAUSE THE DECISION OF THE CIRCUIT COURT WAS CORRECT. IT DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR ANY COURT OF APPEALS.

A. Circuit Courts, Including the Fifth Circuit, Uniformly Hold That Litigants Must Adhere to Rule 50(b).

All of the circuit courts demand adherence to Rule 50(b). As the Fifth Circuit has observed, "[i]t is well-

established law that the sufficiency of the evidence is *not reviewable on appeal* unless a motion for directed verdict was made in the trial court at the conclusion of all the evidence." *McCann v. Texas City Ref., Inc.*, 984 F.2d 667, 671 (5th Cir. 1993). The Fifth Circuit has long adhered to this rule. *Steverson v. Goldstein*, 24 F.3d 666, 669 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 731 (1995); *Wells v. State Farm Fire & Casualty Co.*, 993 F.2d 510, 512 (5th Cir. 1993); *Bunch v. Walter*, 673 F.2d 127, 131 (5th Cir. 1982); *Freimanis v. Sea-Land Serv., Inc.*, 654 F.2d 1155, 1161 (5th Cir. 1981); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978).

The other circuit courts also adhere to Rule 50(b). *See Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995); *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 186 (4th Cir. 1994); *Wang Labs., Inc. v. Toshiba Corp.*, 993 F.2d 858, 868-69 (Fed. Cir. 1993); *Jones v. Lewis*, 957 F.2d 260, 263 (6th Cir. 1992), *cert. denied*, 506 U.S. 841 (1992); *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1458-59 (9th Cir. 1988); *Dancey Co. v. Borg-Warner Corp.*, 799 F.2d 717, 720-21 (11th Cir. 1986); *Johnson v. University of Wis.-Milwaukee*, 783 F.2d 59, 61 (7th Cir. 1986); *Della Grotta v. State of R.I.*, 781 F.2d 343, 349-50 (1st Cir. 1986); *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1478 (10th Cir. 1985); *Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467, 473 (2d Cir. 1985); *Myers v. Norfolk Livestock Mkt., Inc.*, 696 F.2d 555, 558 (8th Cir. 1982).

Accordingly, there is no conflict among the circuit courts concerning the application of Rule 50(b). Each Circuit Court expects a litigant to comply with the Rule in order to later challenge the sufficiency of the evidence after a jury verdict. Significantly, the three Circuits that

Hall suggests depart from Rule 50(b) – including the Fifth Circuit – have applied the rule to preclude evidentiary review. *See McCann*, 984 F.2d at 671 (holding a motion for directed verdict made at the close of plaintiff's evidence, without more, insufficient to preserve error under Rule 50(b)); *Wells*, 993 F.2d at 512 (same); *McGee v. Bauer*, 956 F.2d 730, 733 (7th Cir. 1992) (same). *See also Piesco v. Koch*, 12 F.3d 332, 341 (2d Cir. 1993).

Uniform adherence to Rule 50(b) is not compromised by the rare instance in which a circuit court excuses technical fault in light of substantive compliance, where the Rule's purposes have been served. *See, e.g., Bohrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir. 1983) (holding that the purposes of Rule 50(b) were served by a motion for directed verdict made at the close of plaintiff's evidence), *cert. denied*, 465 U.S. 1026 (1984). The Fifth Circuit in *Bohrer* determined that, at minimum, Rule 50(b) requires a litigant to alert both opposing counsel and the district court to the allegation of evidentiary insufficiency before the case is submitted to the jury. 715 F.2d at 216. This "notice" serves two purposes. First, it provides the district court a chance to assess the sufficiency of the evidence so that the court may re-examine this question if the jury returns a verdict contrary to the movant. *Id.* The notice also gives opposing counsel a chance to cure any defects in proof. *Id.*

Indeed, the Fifth Circuit is not alone in its willingness to examine whether the purposes of Rule 50(b) have been served in rare cases of technical artlessness. Many of the circuit courts that Hall suggests demand "strict adherence" to Rule 50(b) have, like the Fifth Circuit, applied the Rule in light of whether its purposes have been

served. *See, e.g., Reeves v. Teuscher*, 881 F.2d 1495, 1498 (9th Cir. 1989) (holding that court's instruction to renew any directed verdict motions after the verdict excused failure to object at close of evidence); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1331 (6th Cir. 1988) (excusing failure to expressly move for directed verdict at close of all evidence where party stated that he would prefer to handle matters in a post-verdict motion if that became necessary); *Hughes v. Halifax County Sch. Bd.*, 855 F.2d 183, 187 (4th Cir. 1988) (party's failure to move for directed verdict at close of evidence not error where court indicated that it intended to overturn verdict if returned in favor of plaintiff), *cert. denied*, 488 U.S. 1042 (1989); *Armstrong v. Federal Nat'l Mortgage Ass'n*, 796 F.2d 366, 370 (10th Cir. 1986) (failure to move for directed verdict at close of evidence not error where party called only one witness after first directed verdict motion); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982) (failure to move for directed verdict at close of all evidence not error where court had earlier stated that it considered prior directed verdict motion renewed), *cert. denied*, 459 U.S. 1205 (1983). *See also Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 489 (3d Cir. 1991) (holding that litigant satisfied Rule 50(b) despite failure to precisely object to claim challenged on appeal where claim had been asserted in pretrial motion in limine).

And, as Hall concedes, both the Second and Seventh Circuits examine the purposes of Rule 50(b) as well. *See, e.g., McKinnon v. City of Berwyn*, 750 F.2d 1383, 1389-90 (7th Cir. 1984) (excusing failure to move for directed verdict at close of evidence where, among other things,

judge said he would reserve action on first directed verdict motion); *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 62 (2d Cir. 1988) (same), *cert. denied*, 488 U.S. 852 (1988).

Thus, the Fifth Circuit's application of Rule 50(b) in this case does not represent a departure from the Rule's requirements; neither does it present this Court with a circuit conflict. It was instead a recognition that this case presented unique facts requiring the Circuit Court to examine the purposes of Rule 50(b). *See, e.g., McKinnon*, 750 F.2d at 1390 (discussing the purposes of Rule 50(b) and the various factual scenarios that merit excusing technical noncompliance). Hall does not create a "circuit conflict" by citing the anomalous case. As is apparent from a glance at Fifth Circuit case law, the Fifth Circuit follows Rule 50(b), demanding "strict adherence" absent other circumstances. *Compare McCann*, 984 F.2d at 671, *with Bohrer*, 715 F.2d at 217. The difference in outcomes in these cases stems from the reviewing court's determination that, on different facts, the litigants have complied or failed to comply with Rule 50(b).

B. The Fifth Circuit Correctly Determined that Savings' Counsel Complied With Rule 50(b).

Savings alerted both the plaintiff and the district court to the allegation of evidentiary insufficiency on the workers' compensation retaliation claim, and the district court had the opportunity to re-examine this matter after the verdict. Thus, any technical miscue was of no consequence. Pet. Br. App. A at 13. Further, the Fifth Circuit found that the district court occasioned Savings' technical

miscue by "cut[ting] counsel short" and suggesting that counsel's motions were "timely . . . for all purposes," constituting "the record for appellate scrutiny." *Id.* The Fifth Circuit therefore properly assessed the sufficiency of the evidence supporting the jury's verdict. After determining that the evidence was insufficient to support either of Hall's claims, the Fifth Circuit entered judgment in favor of Savings.[1]

The Circuit Court considered its decision to be neither novel[2] nor complex and thus declined to publish the case. Pet. Br. App. A at 2 n.1. (The local rules permit a panel to decline publication for cases having "no precedential value" and merely applying "well-settled principles of law." *See* Fifth Circuit Local Rule 47.5.). The Fifth Circuit publishes opinions which it believes create "a conflict of authority." *Id.* Because the Circuit Court's opinion comports with the approach of the other circuit courts under Rule 50(b), this case does not merit Supreme Court review.

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[1] Hall also suggests that the Fifth Circuit erred in rendering judgment instead of just reversing the award. She does not, however, offer any authority for this proposition. The cases that Hall relies upon hold that an appellate court may not render judgment unless the appellant has moved for a judgment notwithstanding the verdict in the lower court. *See, e.g., Matthias v. Bingley*, 906 F.2d 1047, 1051 (5th Cir. 1990). It is undisputed that Savings moved for a judgment notwithstanding the verdict in the district court. Accordingly, the Fifth Circuit was free to render judgment in Savings' favor.

[2] Employing a sufficiency of the evidence standard is consistent with Fifth Circuit precedent, because "the purposes of the rule have been served." Pet. Br. App. A at 13; *see Bohrer*, 715 F.2d at 217.

C. The Fifth Circuit's Interpretation of the TCHRA is Proper Under Texas Law.

The Fifth Circuit found that neither Hall's emotional condition nor her carpal tunnel syndrome qualified as a "disability" under the TCHRA. Pet. Br. App. A at 21, 23. In reaching this result, it relied in part upon federal authority. *See Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) (holding that "poor judgment, irresponsible behavior and poor impulse control" do not qualify for protection under the Act); *Elstner v. Southwestern Bell Tel. Co.*, 659 F. Supp. 1328, 1343 (S.D. Tex. 1987) (holding that a condition interfering with an ability to do a particular job does not establish a limitation on a major life activity), *aff'd* 863 F.2d 881 (5th Cir. 1988). The Fifth Circuit also relied, however, on a Texas Supreme Court opinion holding that the TCHRA applied only to very severe handicaps "of an incapacitating nature." *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 318 (Tex. 1987).

The Fifth Circuit's reliance on federal disability case law for guidance was proper. The Texas Supreme Court has held that courts may look to provisions of federal law when interpreting the TCHRA. *See Caballero v. Central Power & Light Co.*, 858 S.W.2d 359, 361 (Tex. 1993) (Texas courts may consider how the federal act is implemented under clauses similar to those at issue under the TCHRA). Indeed, the federal standard may be more generous than that which will develop in Texas. *See, e.g., Chevron Corp.*, 745 S.W.2d at 318 (observing that the Texas legislature declined to employ the broader definition of "handicap" in the Federal Rehabilitation Act).

Hall has not, in any event, adduced any authority for the proposition that the Fifth Circuit's holding contradicts Texas law. Neither intermediate state appellate case that Hall relies upon demonstrates that her conditions qualify for protection under the TCHRA. In *Central Power & Light Co. v. Caballero*, 804 S.W.2d 534, 537 (Tex. App. – San Antonio 1990), *rev'd on other grounds*, 858 S.W.2d 359 (Tex. 1993), the San Antonio court declined to apply the amended statute retroactively. In *Finney v. Baylor Medical Ctr. Grapevine*, 792 S.W.2d 859, 862 (Tex. App. – Fort Worth 1990, no writ), the Fort Worth court held that the plaintiff presented a fact issue on whether manic depression is a "handicap." Neither case supports Hall's claim that the Fifth Circuit failed to define "disability" properly.

As the Fifth Circuit recognized, Texas authority analyzing conditions such as Hall's is sparse. Pet. Br. App. A at 22. Hall's appropriate avenue for a definitive ruling on Texas law was a request for certification of the issue to the Texas Supreme Court. *See* Tex. R. App. P. 114 (certification appropriate for "questions of law of this state which may be determinative of the cause then pending and as to which it appears . . . that there is no controlling precedent in the decisions of the Supreme Court of Texas"). *See, e.g., Lucas v. United States*, 807 F.2d 414, 418 (5th Cir. 1986). Hall chose to forego this avenue and should not now be heard to complain of the Circuit Court's interpretation of Texas law.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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